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CHARLES ELMORE CRO

IN THE

Supreme Court Of The United States

NOS. 403, 404

GEORGE ASHWANDER, et al.,
Petitioners

vs.

TENNESSEE VALLEY AUTHORITY, et al.,
Respondents.

PETITION FOR REHEARING

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Petition for Rehearing

And now come petitioners in the above styled causes and respectfully pray for a rehearing of the decree of affirmance entered in the above causes February 17, 1936, and for modification of the opinion and decree, on the grounds summarized below.

I.

There are proven on the record outstanding 20-year contracts by which the Tennessee Valley Authority proposes to fix the rates for local agencies to compete with all of fourteen local utility systems reserved to petitioners' corporation under the contract of January 4, 1934.

As to the principal systems the Authority has entered into definitive contracts with its controlled agencies, set out in the record. As to the remainder the negotia-

tions have reached the status of arrangements, awaiting dissolution of the restraint in this cause to ripen into final agreement.

By these contracts, the Authority supplies the power, by means of the transmission lines covered by the contract of January 4, on the express condition that the purchaser submit for the full term to TVA regulation of rates to the public and buy exclusively from TVA. In fact, the rates are fixed flat for twenty years. In consideration for this surrender to the regulatory control and monopoly of supply by TVA the utility is given (a) the committment of the government to continue in the commercial business for 20 years, (b) a schedule of rates shown on this record by the government's computation to be 40%-60% below the rates established by public authority in Alabama and shown on the record to be reasonable.

The principal difference between control of rates by TVA and control of production by AAA is that TVA commits the government at one stroke to continue the arrangement for twenty years instead of one, and also fixes the resale rates to the public for twenty years; acquiring, in addition, a contractual right to monopoly of supply.

The findings, the undisputed record, assure that this use of the transmission lines will result in the TVA controlled system taking the entire local business of all fourteen systems at the rate of not less than 70% the first year and 10% per annum thereafter until exhaustion of petitioners' market.

The record is undisputed to the effect that the transmission lines are not to be used for the transmission of power for government use or for sale at the end of transmission to the best or to a free market. On the contrary those purchasers who alone are regulated by the State are either excluded or deferred. Sales are to be made to preferential classes who will submit to fixation of the rates and the standard and invariable regulations of service, accounting and reserves by the Authority.

The case, accordingly, is not the case assumed in the opinion: transmission of power for sale. It is the case of transmission over these lines for sale to purchasers who will bind themselves to a resale of the power only at prices and under conditions prescribed inflexibly by TVA, frozen into outstanding contracts and unconditionally adopted as the only basis on which TVA will offer its sub-normal rates, its stand-by and back-up service and its commitment of Congress and the federal government to a 20-year servitude.

II.

The opinion and decision pretermits all constitutional questions urged on this record save the single question as to the constitutional authority to generate electricity at Wilson Dam and dispose of that manufactured product as property of the United States by transmission to market. The exclusion of all other questions and dismissal of the bill puts petitioners' corporation to the alternative of performance of the contract and the acceptance of benefits under the contract, together with the

corresponding waiver and estoppel as to constitutional rights or, as the sole alternative, refusal to perform and its consequences. Either decision assures immediate steps to establish direct or controlled competitive operation and regulation of local utility systems in competition with the Alabama Power Company's fourteen (14) urban systems in the contract area, as well as beyond.

The Tennessee Valley Authority has asserted on this record and before this Court that the provisional and temporary executed transactions with the government prior to the execution of the contract and the bare execution of the contract of January 4, 1934, itself, accompanied by the Authority's alleged abstention from competitive duplication and operation of facilities outside of the contract area (TVA Brief, p. 33) establish waiver and estoppel effective to prevent petitioners' corporation and petitioners from complaining of violations of the Constitution by TVA, in the course of the latter's competition with the corporation. Four of the Justices of this Court appear to concur in that view. That view was asserted before performance.

Thus, performance and the acceptance of the putative benefits of a contract forced upon the management in order to salvage or delay complete disaster, faces petitioners and the corporation not only with the loss of its properties and business for a fraction of its stipulated bare bones replacement value, but with the forfeiture of rights which it now has to claim protection under the Constitution.

The opinion and decree, in declining to consider on this record the rights asserted under the Constitution, enforce the forfeiture of those rights, the protection of which from direct abandonment and abandonment by waiver or estoppel was the sole purpose of the suit.

The rights asserted by petitioners relate to specific violations of the Federal Constitution directly involved in the overt program of the Authority, assured on this record as to the use of the properties being purchased and inherent in performance of the contract itself.

The record bristles with formal contracts by the Tennessee Valley Authority for the operation or direct control of local utility functions, *including in all cases* the complete fixation and regulation of rates, both within and out of the contract area. As fully documented on this record, the regulation of rates to the public is in all cases fixed by the Authority and removed by 20-30 year contracts from possible regulation by the State or even from the laissez faire principles of competitive supply and demand, should the State elect that policy. In all cases the absorption and monopoly of the local utility market by the government is assured and indisputable.

Price regulation and fixation by the Authority is not only frozen into the contracts actually executed, outstanding, and awaiting only the return of the mandate in this case for immediate translation into performance; not only has it been adopted as the standard and invariable method of sale of power by the minutes of the Authority, from which there has been no departure in any case whatever, and none is proposed. In addition, the

amendment of the Act [Amendment, Section (6)] extends the arbitrary discretion of the Authority to prescribe the rates. Thus, in addition to illegality under the common law there is 20 year violation of the Constition.

The opinion states (p. 9) that "the government could lease or sell and fix the terms"; but this is, we are sure, necessarily limited by the statement immediately preceding, that the method of disposition must be appropriate and in the public interest * * * "and must not be contrived to govern the concerns reserved to the States."

III.

The primary basis for stockholders' suits recognized by the opinion is the right of the stockholder under appropriate conditions to extricate the corporation from unconstitutional exactions by government to which the management has been constrained to yield. The effect of the opinion is, accordingly, by the decree of unqualified dismissal, to confront petitioners with a sweeping forfeiture of their right to complain at all of the direct and permanent violations of the Constitution, assuring the immediate partial and progressive total mutilation of the investment, which forms the basis of the suit.

Within this controversy, as particularized below, it is respectfully insisted that the immediately threatened violations of the Constitution documented on this record present a case for justiciable action not only within the scope of general equity jurisprudence, but plainly within the contemplation of the Declaratory Judgments Act.

Borchard, Declaratory Judgments, schedules a long series of controversies brought within the scope of statutes to declare and thereby establish avoidance of penalties or other consequences so grave that the risk of wrong guessing prevents any resistance at all. *Ex Parte Young* is an illustration, where injunction lies. The author fully documents instances of declaratory judgments to avoid waivers and estoppel in advance of their accrual (p. 357); to establish freedom from governmental requirements, penalties and liabilities (p. 344); or to vindicate the privilege to act free from restraint by the government (p. 611). It was unsuccessfully urged in *Terrace v. Thompson*, 263 U. S. 197, that Terrace might sell his property to the unqualified alien and thereupon challenge the validity of the Forfeiture Act in the forfeiture proceedings. This Court held that it was not necessary for Terrace to destroy himself to find out. That is the equivalent of the course forced by the opinion on this record.

The threats of immediate competitive destruction through illegal means to be made doubly effective by the transfer of the properties under contract and the emasculation of constitutional right which attaches is more imminent than was the case in *Pierce v. Society of Sisters* and in *Pennsylvania v. West Virginia*.

Fixation of retail resale prices of a commodity no longer owned by the seller, by affirmative contract to endure for twenty years, and relating not only to present sales but to all future sales of the commodity (except as may hereafter be otherwise consented to at the arbitrary discretion of the TVA board, without any standard laid down by Congress to guide it) is obviously and incontest-

ably not a legitimate function of disposal, but is a function of regulation of the use of the commodity—in this case a commodity whose sale is responsive solely to the jurisdiction of the State. Thus the sale of power to be accomplished by the high tension lines and properties taken into the TVA program, is shown on this record to be a deliberate and permanent plan to govern the concerns reserved to the States.

IV.

The record demonstrates why under no circumstances will the Tennessee Valley Authority retreat from its standing determination to regulate the retail price of electricity in the area which it proposes to dominate.* See Minutes, R. 543 (d).

Although at the outset and before the Amendment the Tennessee Valley Authority Act (Section 12) authorized the Authority to regulate the resale rates of its private utility customers, but contained no such express authority as to municipal customers, all contracts with municipal customers entered into by the Tennessee Valley Authority, fully shown on this record to be outstanding both within and without the contract area, have from the beginning fixed and regulated the rates of the municipality at a scale which petitioners' corporation cannot possibly meet; a scale which it may not lawfully meet

*Since writs were granted in this cause, the public press has announced that cities in West Tennessee owning and operating their own distribution systems, to which the Authority was offering to transmit and sell power under its rate control contracts, declined even the sub-normal city gate rates offered by the Authority because the latter refused to leave to the municipalities and to the State of Tennessee the right to fix and regulate the resale prices of the energy. The Authority will not sell to a free agency, as shown on this record.

without the approval of the Alabama Public Service Commission; a scale which destroys the existing policy of competitive uniformity of the State. See brief Amicus Curiae, for The County of Tallapoosa.

The amendment to the Act which extends the unconditional power of the Tennessee Valley Authority to fix and regulate all resale rates, both to private customers and to municipalities (Amendment, Section 6, Appendix to Petitioners' Brief, p. 17) backs up the proven intent to dominate domestic concerns for the single purpose, declared by TVA, of establishing yardstick control.

Thus on this record this court is confronted with the absolute certainty that the properties in suit are being acquired to serve as a direct means of regulating local utility rates and service, pursuant to overt acts, executed contracts, formally adopted resolutions and a demonstration of imminence that on this record is paralyzing in its certainty.

The foregoing is but a single illustration of the illegal means and objectives directly threatened and imminent in the use of the property covered by the contract.

The effect, accordingly, of the opinion and decree is to reserve for decision the consideration of these grave constitutional questions, while at the same time condemning petitioners and their corporation to the claim of permanent waiver and estoppel from effective complaint, accomplished as a result of performance of the contract and going to the survival of the corporation.

V.

The controversy based on the execution and proposed performance of the contract of January 4, 1934, includes necessarily

(a) The question whether the contract and its performance will automatically result in waiver and estoppel on part of the corporation and its stockholders as to the right to challenge competition by the government by the illegal or unconstitutional means proven on this record and reflected in the findings, but excluded from consideration by the Court; and

(b) The question whether performance will result in assured action by TVA subjecting the property to be transferred to those uses in competition with petitioners' corporation which were inherent in and contemplated by the contract, were not considered by this Court, and are asserted by petitioners to be violative of the Constitution.

Both questions relate directly to the contract, its performance and effect. They form the basis of the controversy over the contract and the necessity for the stockholders' suit quite as fully as that single phase of government competition furthered by the contract which was considered in the opinion, viz., manufacture of power at Wilson Dam and transmission to a market area.

The suit was filed and was indispensable to protect the stockholders against action by the management "in yielding without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions" (Opinion, p. 4).

A contract which both on its face and by necessary implication, also by reason of full warning given by the government to the corporation in the negotiations, accompanied by overt acts then and now in motion,

1) Contemplates the multiplicity of illegal aims and means found and shown on this record in furtherance of destructive competition by the government with the corporation;

2) And by performance works waiver or estoppel against resistance as to the aims and means, which are asserted to be illegal or non-federal,

can not be said to be removed from the justiciable controversy over the contract because a single one of the proposed uses to be made of the contract and of its performance (bona fide transmission for normal sale) is adjudged to be within the abstract powers of the federal government.

The conclusion as to that single function is, indeed, abstract on this record for this reason: there is no evidence in the record to sustain the notion that if bona fide sale of a federal commodity at the best price and on the best terms were the real objective these lines would have been acquired and the most available customers would have been definitely excluded from the bidding and the Authority would thus be binding itself by 20-30 year contracts to insolvent and no-asset agencies and retail or small consumers.

The theory of simple transmission and sale (and by sale we mean constitutional disposal of property) is not remotely within any phase of the program shown on this

record. But if it were, it would be one abstract use among a series of proven illegal uses in motion and under execution.

The effect of the Court's ruling, to the practical effect that only the single use need to be considered, without decretal order so qualifying the use, is precisely as if this proceeding were a proceeding for the condemnation of the properties under contract for transmission of power for consumption by the government itself for governmental purposes, with no formed plan reflected in overt action and documented on the record to use it for non-federal purposes.

So to regard the controversy is to overlook the findings of both courts, the formal minutes of the corporation, the res gestae declarations of TVA, the declarations stated in the negotiations, the representations made by TVA in the Congressional hearings, the contract itself, and a series of contracts executed by the Authority and awaiting return of the mandate on this dismissal to ripen into performance.

There is no remote suggestion on the record that the government (TVA) would purchase or use the transmission lines and twenty-two (22) local distribution systems to be transferred (Finding No. 70 (a); R., p. 1059, which were in addition to the fourteen (14) systems reserved) *in order to transmit hydro-electric power to a

*The opinion inadvertently assumes that the acquisition and operation of local distribution systems to be served by these lines was not involved. Twenty-two are acquired under this contract. When the suit was filed TVA on this record and under the entire Commonwealth and Southern Agreement had committed the Government to direct local utility service of over forty-thousand consumers. See infra.

market area in order, in turn, simply and lawfully to sell it, were it not for the interconnected network program and yardstick utility objective reserved by this Court from consideration.

Consideration of that definite commitment, in large part executed, is indispensable in determining whether under the arbitrary discretion delegated to TVA, the latter has in fact formulated a program to dispose of government property or a program to dispose of government property in a particular manner in order to accomplish a non-federal objective.

It is not primarily an Act of Congress that is being construed. The Act is not self-operative. This proceeding involves a complete, certain and integral program of an administrative board, whose dominant and primary objective is defined on this record not only by its minutes and its uniform res geatae declarations but by its own acts.

The minutes of October 13, 1933, are not an abstraction, nor are the standard forms of control contracts, nor the actual purchase, for actual operation, of local distribution systems not only in Mississippi and Tennessee but twenty-two systems conveyed by this contract. Nor is the adoption by TVA of insolvent agencies abstract, since this record shows the executed contracts with TVA and the government containing covenants to operate local competitive systems, constructed wholly from government funds, for the account of and at the risk of the government; with the rates fixed by contract with TVA for twenty years in assured competition with the Alabama Power Company.

VI.

The Controversy Over the Contract Based On the Asserted Illegal Objectives Contemplated by the Parties and Inherent in the Contract as Negotiated.

This suit presents a contract which on its face and by necessary intent, conclusively authenticated on this record, committed both parties to the contract to government acquisition of the high tension transmission lines and twenty-two local utility distribution systems for the following stated inherent, publicly declared and mutually understood purposes, all of which petitioners assert to be illegal:

1) Operation of the 22 local utility systems included in the contract (Finding 70 (a), R., p. 1059). On the transfer of the properties, no immediate question of competition would remain, but they make plain the intent as to local utility distribution, removed from state regulation, with local rates fixed directly by the federal government and utility service removed wholly from state control. The contract recognizes that principle; and TVA proposes to pay the corporation a salvage consideration for its properties for the admission.

2) Direct operation or establishment of local utility systems within the contract area to *compete with petitioners' fourteen systems reserved from the contract of sale* (Section 5). The characteristics of this control have been stated. It extends moreover to financial establishment and equitable ownership by the government of the agency and its operation at the risk and for the account

of the government. Both of these facts and conditions are assured by outstanding contracts.

3) Service of like competitive systems outside of the contract area, to which, notwithstanding the so-called truce, TVA in combination with PWA already stands committed in the area as far as one hundred miles south of the contract area. TVA regulation and control, PWA equitable ownership, shown on this record to be joint action in furtherance of the TVA program.

4) Transmission of power to the commercial market both in wholesale and retail, with full control and regulation of local rates and service, from the Government's interconnected pool of power derived from its commercial generating plants at steam plants and at the entire river and headwater series:

(a) Muscle Shoals steam plant;
(b) Wilson Dam;
(c) Wheeler, Norris and all other dams in the power dam series in which commercial generating units are being installed;
(d) Other commercial steam plants, etc.

The opinion deals with the single phase of 4 (b) alone, that is, supposed transmission to high tension market of power manufactured for commercial sale at Wilson Dam, on the theory that the power at Wilson is sufficient if TVA elects so to restrict it, to supply, for the time being, the contract area. But the properties of petitioners' corporation are not restricted to the contract area. Nor are the commitments by TVA from Wilson Dam limited to that area. The recent contract publicly announced with the City of Memphis is definitely related

to Wilson Dam. Hence it can not be assumed that the Wilson power will be held available for this area and that power from the pool will not be necessary to serve it.

The record is incontestable as to the intended interconnection both of the steam plant and the entire river series. The entire program of TVA is based upon the elasticity of complete control and pooling of the energy of the Tennessee River.

No one would make the contention that the cost of power, plus transmission, from Wilson Dam, assuming honesty in the allocation of investment cost, could be committed for a 20-30 year term on the basis of the schedules made effective, without assuming a consolidated load that would average down the cost at Wilson. See estimate of Chief of Engineers (Veto Message of Mr. Hoover, Appendix, petitioners' brief, at p. 69).

Even as to Wilson Dam power, the opinion excludes from consideration the certainty established by this record that the commercial manufacture of power at Wilson Dam is being undertaken under 20-30 year commitments of the federal government to an elaborate and permanent commercial enterprise predicated on the yardstick program, exploited on that basis, priced on that basis, laid out and routed on that basis, under color of the absolute delegation of authority delegated to TVA by the Act. The competition with petitioners' corporation is not the competition of legitimate commodity sales but the competition of permanent service guaranteed by the treasury against repudiation of the sub-normal price schedules for a generation.

* * * * * *

Entirely aside from the single matter of Wilson Dam power transmission considered by this Court, petitioners have the right to object to any action by their corporation or any contract which on its face or by necessary implication, by acceptance of benefits, waiver, estoppel or otherwise commits the corporation to acquiescence in an unconstitutional or illegal program of competition and of exhaustion of the corporation by the Government.

This result is assured or threatened immediately and definitely under government contracts now in motion, as to the principal units of the fourteen systems left stranded in the contract area; by answers and admissions that the same result is assured as to the other towns; by outstanding final commitments as to Bessemer and Tarrant City outside of the contract area, and progressively and inevitably southward as the rapidly increasing amounts of power reach the yardstick pool.

It can not be that the Court will enjoin as traditionally justiciable at the suit of stockholders submission by the management of their corporation to an unconstitutional tax leviable only for a year, which may, if oppressive, be repealed on appeal to Congress, and yet will not force the corporation to revise or recede from or grant relief as to a contract which upon its face and by necessary implication invites federal competition that is permanent in character, illegal, unconstitutional and admitted by the government to assure complete destruction.

On the assurance that the competitive TVA controlled system would take the entire market in the service area and justified by that assurance alone the govern-

ment is shown on this record to be under definite contract to finance competitive local distribution systems as agencies to retail TVA power at rates controlled directly by TVA.

Now TVA has no supposititious investment to secure. The determination by it of the rate structure is stated by it on this record to be for yardstick control alone and for no other reason (Record, p. 543). Destruction of local competitive systems under this program having once set in, it is final and irrevocable. Congress itself, having delegated to TVA the power to entrench the program, could not retreat.

We respectfully assert that the controversy involved on this record can in no just or proper sense ignore the permanent business commitments, the unconstitutional Congressional delegation, the direct and controlled local utility service and rate regulation and the specific illegal competitive means and overt contractual action demonstrated on the record and awaiting only the return of the mandate in this case, not for their formulation, but for their final accomplishment. They stand committed by contract and are immediately impending.

In no single case involving the various PWA loan contracts which have reached the Courts, and have come to our attention, has the bill been dismissed because the alleged illegal competition was not imminent. It is for that reason that we respectfully insist that the question of the constitutional right of the Government to acquire or operate or regulate local or urban distribution systems in

direct competition with petitioners' corporation is necessarily involved and conclusively shown on this record.

VII.

The Controversy Over the Contract Based on the Effect of Performance as a Waiver or Estoppel Preventing Challenge of Illegal and Unconstitutional Competition.

We stated at the outset as a principal ground for this petition that unless this Court grants protection on this record by restraint or declaration against the use by TVA of the property to be transferred or against using the bare fact of performance, as a means to make effective the threatened acts and means of competition asserted by petitioners to be illegal, petitioners will be confronted automatically on final acceptance and performance of the contract with the grave question of waiver or estoppel.

This question will arise directly out of the agreement and its performance. It confronts the right of petitioners and their corporation to challenge competitive acts of TVA, asserted on this record to be illegal or unconstitutional, which are contemplated as functions of TVA as shown by the express or necessary intendment of the contract, by the known and declared purpose and intent of the purchaser and by the circumstances known to both parties surrounding its negotiation. The minutes of TVA during the negotiations disclose mutual recognition that the Authority is in the power business and that its sole purpose is yardstick regulation (Record, p.

551, Oct. 24, 1933) of all resale rates [R., p. 543 (d)]. And see the public announcement of this contract asserting this recognition by the parties (R., p. 622).

TVA asserts that petitioners' corporation, by contracting with TVA, known to be acting under color of the Tennessee Valley Authority Act, has become estopped to challenge the validity of that Act. And so as to the entire battery of illegal overt steps shown on this record, including the regulatory yardstick functions contemplated in the negotiation and execution of the contract.

The contract recognizes that TVA intends both to operate directly local utility systems and to supply and control utility distribution by means of the transmission lines in question, directly as in the North Mississippi systems taken over; directly as in the twenty-two local system-areas transferred by this contract, and either directly or by a controlled yardstick agency under its standard form of agency contract (financed, equitably owned and operated at the risk and for account of the Government), in the fourteen urban system-areas. At the time this suit was filed TVA proposed on this record to purchase for itself the fourteen local systems, but rejected, pending the hearing, direct ownership and substituted direct regulation by TVA and equitable ownership by PWA, which was the status at the time of decree and at the present time.

At the time this suit was filed TVA had undertaken to assume direct local utility service of 42,500 customers in 30 counties. Therefore the corporation, by performance, is asserted to waive any constitutional right on be-

half of itself or its stockholders to object to functions thus said to be inherent in the negotiations, in the contract and in its performance.

The management of a corporation can yield to an unconstitutional exaction (a) by entering into a contract expressly agreeing to yield or (b) by entering into a contract the legal effect of which is to estop or waive the right. From a stockholder's standpoint there is no practical or legal distinction between passive lack of resistance and affirmative action having the same result. Passive yielding is actually less ominous. It is not final. Petitioners here are confronted, by the Court's refusal to adjudicate the overt acts, with the risk of an irretrievable bar.

In short, by this contract TVA acquires from the corporation not merely the property of the corporation by threat of competitive duplication, a phase of the record to which the opinion gives no consideration; but also purports to purchase a waiver of Constitutional rights as the condition on which an agency of the Government will undertake, for a few months only, to refrain from unconstitutional or otherwise illegal aggression.

We respectfully submit that any such casus is justiciable as an inherent element in the controversy over this particular contract and is directly related to it. It is inseparable from the formidable menace of waiver and estoppel involved in performance.

Relief under these circumstances and on this record is essential to the theory underlying protection of

rights against unconstitutional aggression, permanent, final and instantaneous in its destructive certainty.

When accompanied, as here, by adequate means and energized by the will of an arbitrary board asserting unconditional delegation of the arbitrary power to accomplish it, this action in exacting the bargain, both by the terms and by the necessary result of the contract, is, we submit, on no better basis than any other illegal condition effectively imposed upon or forcing waiver of a Constitutional right.

W. U. T. Co. v. Kansas, 116 U. S. 1,

Union Pac. Ry. v. Pub. Serv. Com. of Mo., 248 U. S. 67.

The unconditional dismissal directed by the opinion accomplishes that result.

VIII.

The Pronouncements, Policies and Program of the Tennessee Valley Authority and Its Directors Had Fruition in Action of a Definite and Concrete Character Plainly Falling Within the Basic Controversy and Calling for Judicial Consideration on This Record.

The opinion states (p. 9):

> "While plaintiffs, as stockholders, might insist that the board of directors should take appropriate legal measures to extricate the corporation from particular transactions and agreements alleged to be invalid, plaintiffs had no right to demand that the directors should start a litigation to obtain a general declaration of the unconstitutionality of the Tennessee Valley Authority Act in all its bearings or a decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies."

We have stated above the reasons why the basic illegalities which we have asked this Court to consider and adjudicate on this record are necessarily within the controversy arising out of the contract. They were inherent in the contract of January 4, 1934, and in the necessary contemplation of the parties.

They may be briefly documented to the record here:

1) The illegal objectives are to be made effective by means of the transmission lines to be transferred, since by means of those lines TVA proposes to supply power to competitive systems in all of the defendant

towns. The contracts to that end are substantially identical (R., p. 661). Definitive contracts have been actually entered into by TVA with the defendant towns, Athens, Decatur, Florence, Russellville, Sheffield and Tuscumbia (R., p. 660). All of the others admit tentative proposals or arrangements (R., p. 355), copying the answer of Florence, which has entered into the definitive contract unconditionally yielding to the TVA standard rate fixation.

The standard and invariable form of these agreements is set out in the TVA minutes, (R., p. 548) is set out in the TVA answers to interrogatories (6-a-6-c, R., p. 657-660), their factual effect is stated in the findings (Fng. Nos. 83, 109 (b)); the full form is found in the record at pp. 1202-1238.

By this form of contract TVA unconditionally fixes the rates which must be charged the public for twenty years. It fixes the regulations, the accounting, the disposition of revenue and reserves.

The entire funds with which to build the systems have been finally allotted by PWA for immediate construction of systems to distribute this power in other cities (Brief for Petitioners, p. 35). These allotments are for the full cost. Nothing is contributed by the municipality. The government is the sole equitable owner. The system is to be operated for its account and at government risk. The municipality assumes no obligation (Petitioners brief, p. 44 et seq).

IX.

The Conclusions of Law Asserted or Implied in the Opinion.

It is most respectfully submitted that certain of the conclusions stated in the opinion and inferences to be derived from certain conclusions should be modified.

The opinion asserts:

> "The Government acquired full title to the dam site, with all riparian rights."

This expression might imply that the government had in acquiring the site for Wilson Dam acquired the right of the riparian owner to use the dam for commercial purposes rather than solely for the improvement of navigation or war or related federal use. Plainly, the government could not lawfully acquire property other than for governmental use or in order to make money on the side by commercial non-federal operation or sale of surplus or unnecessary properties. *Brown v. United States,* 263 U. S. 78, 83, in no sense impairs the reason and authority on this point of *In re Opinion of Justices,* 204 Mass. 607, 27 LRA (N. S.) 483; *In re Opinion of Justices,* 204 Mass. 616, 91 NE 578; *Salisbury Land & Improvement Co. v. Commonwealth,* 215 Mass. 371, 46 LRA (N.S.) 1195; *Richmond v. Carneal;* 129 Va. 388, A.L.R. 1341; *I Lewis Eminent Domain,* Sec. 1; *Cooley, Constitutional Limitations,* 6th Ed. p. 651; *Nichols Eminent Domain,* p. 178. The public records moreover attest the certainty that petitioner's corporation or its predecessor which had paid $500,000 for the Wilson Dam

site, being unable to agree with the War Department upon the price for the property, conveyed the property to the government for a consideration of one dollar for purposes formally stated as follows:

> "In times like these, however, such considerations must be secondary to the urgent need of the Nation to secure these properties immediately for the carrying out of the Government project for the production of war nitrates, and we have accordingly determined to donate our lands to the Government for this purpose."*

Even if the United States could acquire riparian rights either in land or in water for commercial and non-federal purposes, or to reimburse the treasury, it has been conclusively adjudicated by this Court in the first Green Bay Case (*Kaukauna Water Co. v. Green Bay Canal Co.*, 142 U. S. 254) that where public authority (in that case the State of Wisconsin) desires or proposes to acquire the water rights of riparians above and below a navigation dam in order to produce water power at a given navigation dam, it does not acquire those rights as an incident to the construction of the navigation improvement, *but must proceed to acquire them by condemnation.* In the case cited, the Court found that by the Act of 1848 and pursuant to the local policy reflected in the Wisconsin Constitution, there had been a taking by the State. This taking was originally without the payment of compensation as required by the Fourteenth Amendment but the obligation was subsequently dis-

*February 18, 1918—Muscle Shoals—Hearings, Senate Com. on Agriculture and Forestry, Sixty-Seventh Congress, 2d Sess. on S. 3420 at p. 154, April 18, 1922.

charged by the federal government when it purchased so much of the navigation improvement as was necessary to that end and made provision for payment for *all* water rights, including those relating to navigation, which had been originally involved in the concentration of surplus water at and through the locks and power wheels.

The opinion also contains this vital expression:

> "The power of falling water was an inevitable incident in the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States." p. 12.

The authorities upon which these statements are made are the second *Green Bay Case,* (172 U. S. 58, 80), the *Chandler-Dunbar Case* (229 U. S. 53, 72, 73) and the *Pfost Case* (286 U. S. 165, 170). In *Wisconsin v. Illinois,* this Court unmistakably disapproved the theory asserted in that case in behalf of the Drainage District that the waters of navigable streams are subject to discretionary appropriation, use or donation by the Federal Government even where the surplus diverted or proposed has no positive relation to navigation (*Wisconsin v. Illinois,* 278 U. S. 367).

The decisions in the great interstate water cases, beginning with *Kansas v. Colorado,* (185 U. S. 208; 206

U. S. 46); *Wyoming v. Colorado*, (259 U. S. 419; 260 U. S. 1); *Connecticut v. Massachusetts* (282 U. S. 660); and *New Jersey v. New York* (283 U. S. 336) attest the certainty that the appropriation by the Federal Government of the volume or use of the waters of navigable streams is not subject to the discretion of Congress where its action has no positive relation to navigation, and it is not, in our opinion, possible to sustain, in the light of those decisions and *Wisconsin v. Illinois* (278 U. S. 367) and *United States v. Rio Grande etc. Co.* (174 U. S. 690, 709), the expression from the second *Green Bay Case* quoted in the *Chandler-Dunbar Case*, and in the opinion of the present Court to the effect that there can be no divided authority; or the implication that the Congress may arbitrarily determine at what points in the dam surplus waters in no defensible sense required for the service of navigation may be withdrawn for power or arbitrarily determine the quantity which can be treated as surplus.

We respectfully but as earnestly as its monumental importance justifies, submit to this Court that the opinion in this case restates a contention which was asserted and denied in *Wisconsin v. Illinois*. In that case, while recognizing the full supremacy of the National Government and citing the Chandler-Dunbar Case, the Court in an unanimous opinion asserted that Congress in the exercise of its power "may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriate to that end."

We further respectfully submit that the quotation of the fiction employed, arguendo, or as illustrative in the second Green Bay Case (*Green Bay Canal Co. v. Patten Paper Co.* 172 U. S. 58) to the effect that the "substantial meaning of the transaction was that the United States granted to the Canal Company the right to continue in the possession and enjoyment of the water-powers and the lots appurtenant thereto, subject to the rights and control of the United States as owning and operating the public works"; and that the method by which the arrangement was effected was "as efficacious as if the entire property had been conveyed to the United States by one deed, and the reserved properties had been reconveyed to the Canal Company by another," was not employed in support of the far-reaching consequences now for the first time asserted in a case in which there is presented and necessary for decision a claim of proprietary ownership in the water power of a stream as an incident to the improvement of navigation. The expression was employed to sustain the contention of the Green Bay Canal Company that the Federal Court had jurisdiction because of rights asserted under an Act of Congress. That conclusion could have been sustained under the facts on that record without in any sense requiring consideration or decision of the commercial and proprietary rights asserted on behalf of the government in this case. No such controversy was there involved. The Green Bay Company had acquired full title from the State of Wisconsin which had taken the water rights, though long before compensation was made.

As had been pointed out in the first *Green Bay Case* (*Kaukauna Co. v. Green Bay Canal Co.*, 142 U. S. 254) provision for compensation sufficient to satisfy the Fourteenth Amendment was subsequently made available under the Act of Congress authorizing the Secretary of War to acquire such parts of the property as might be required for the purposes of navigation. The Secretary of War did expressly reject as unnecessary for the uses of navigation the water power. The water power was expressly excluded from the conveyance and was never conveyed to the United States, although, in the sense necessary to sustain the jurisdiction of the federal court and in that sense alone, the United States had, by making the belated provision for the payment of compensation, relieved the State of Wisconsin and its successors, Green Bay Company, of the danger of successful attack under the Fourteenth Amendment. In that sense the claim was referable to the action of the Government and justiciable in the Federal Court.

Under these circumstances, it is, we submit with profound deference, wrong and unjust on the authority of that case, to assert that the decision justifies the commercial and non-federal attributes claimed by the Tennessee Valley Authority and for the first time presented squarely to this Court in a case in which the question is necessary to the decision and its momentous consequences are known and understood.

It is respectfully insisted that *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, quoted in support of the Court's conclusion, is not consistent with that conclusion and is, on the other hand, authority to the contrary. The

opinion in this case plainly implies upon the cited authority of the *Pfost Case* an identity between the mechanical energy of water power and the subsequently manufactured product, whereas the contrary was not only stated in the *Pfost Case*, but was necessarily stated in order to sustain the right of the State of Idaho to tax the generation of electricity against the claim of immunity under the commerce clause interposed by the manufacturer:

> "Thus, by the application of human skill, a distinct product is brought into being and transmitted to the places of use. * * * The process by which the mechanical energy of falling water is converted into electrical energy, despite its hidden character, is no less real than the conversion of wheat into flour at the mill" (p. 180).

It is that commercial manufacturing process to which the TVA program is committing the properties, the personnel, and the enforceable liability of the government for a generation. It is not a sale of that which the government owns, but permanent commitment to a commercial manufacturing business.

X.

The Validity of the Method of Disposing of the Energy Commercially Generated at Wilson Dam.

There is no remote suggestion in the record that the method actually employed by the Tennessee Valley Authority for the transmission of this energy contemplates merely sale of this commercial power in any constitutional sense of the term.

As made possible by the Act of Congress through its unconditional delegation of authority to TVA and following upon the heels of the basic misconception of the TVA Board that its members took their appointments encumbered with the President's yardstick function;

> "In view of his sponsorship of this legislation the yardstick idea must be taken to be definitely a part of the policy embodied in the Tennessee Valley Authority Act" (Minutes, October 13, 1933, R., p. 543);

the program of distribution to be devised by TVA must intentionally exclude the marketing of the power in the ordinary sense of the term, such as to any and all customers, including private utilities who were, according to the minutes, expressly excluded as bidders for the output (ib.), even, manifestly, where they might, as conclusively shown on this record, be ready to negotiate, however onerous it might be, for the purchase in the open market of the entire available power, and thus for years idle their existing generating capacity. In any event, the record is incontestable that from the initial declaration of the program in August, 1933, through the minutes and on into the fixed contracts for the sale of this power to the public by controlled agencies of the Authority, the plan in its entirety and in every detail has been devised and subordinated to the principle that in its execution the Tennessee Valley Authority must give design and emphasis to the yardstick conception.

"It is for this reason", asserts the minutes (ib.) "that the Authority has adopted a policy of rate and accounting control of municipal distribution operations."

This purpose and this basic plan underlie the whole conception and every act in it.

Under these circumstances we earnestly assert that the conclusion of this Court in effect to the contrary does not take appropriate cognizance of the fact that the formulation of the plan and the purchase of the transmission lines and 22 local distribution systems to be acquired under the contract of January 4, 1934, are infected by the conception of the plan, by each step in its development etched plainly on this record and by the binding and justiciable contracts of the Authority for the control of retail rates in the area to be served by the lines; contracts which are ready to ripen into instant performance unless the opinion of this Court is modified.

XI.

The Commercial Business of Using an Alleged Right or Easement in Water With Which to Manufacture Electricity for Sale in a Permanent Business in State Domain.

The opinion asserts (p. 17):

> "We think that the same principle is applicable to electric energy. The argument pressed upon us leads to absurd consequences in the denial, despite the broad terms of the constitutional provision, of a power of disposal which the public interest may imperatively require. Suppose, for example, that in the erection of a dam for the improvement of navigation, it became necessary to destroy a dam and power plant which had previously been erected by a private corporation engaged in the generation and

> distribution of energy which supplied the needs of neighboring communities and business enterprises. Would anyone say that, because the United States had built its own dam and plant in the exercise of its constitutional functions, and had complete ownership and dominion over both, no power could be supplied to the communities and enterprises dependent on it, not because of any unwillingness of the Congress to supply it, or of any overriding governmental need, but because there was no constitutional authority to furnish the supply?"

We respectfully submit that the implications from this statement are too broad; that is, that where the government condemns for federal use a power or manufacturing plant upon which a large section of the public has been dependent for the supply of electricity or other commodity or service, but whose property has not been taken, the government may commit itself to the permanent supply of that service or commodity to the public. We submit that neither *Brown v. United States*, 263 U. S. 78, nor any other decision of this Court justifies the conclusion which follows from the quoted expression, and that the most dangerous and far-reaching consequences will attach to its use. "Communities and enterprises" imply retail distribution. If the government for a lawful national purpose condemns a hydro-electric plant or condemns or erects a dam or emplacements, it can sell or lease what it owns, namely, the plant or units in that plant or the emplacements to the "communities or enterprises". or any public or private agency, but we submit that it can not fetter or barter the duty of regulating navigation and that the government of the United States

has no lawful right under the Constitution to engage in a permanent business of manufacturing electricity or any other exigent commodity to sell to those sustaining consequential damages as a result of the taking of any manufacturing plant whatever.

The government might pay the owner of the property in kind (that is, in power) pursuant to agreement, as a rational means related to acquisition and having no impact upon the functions of the state; but no exigency or unwillingness of communities or enterprises to operate their own utilities or to lease emplacements or units from the government, however great the exigency, can so permanently enlarge the Constitutional power of the Government as to authorize it to monopolize permanently the utility service in any area or commit the government and Congress for generations to that end, where justiciable objection is made.

> "It is obvious that there may be matters of the sharpest exigency for national well being that an Act of Congress could not deal with." *Missouri v. Holland*, 252 U. S. 416.

In like manner, we submit that the succeeding expression of the Court's opinion (pp. 17-18), viz:

> "Or that, with abundant power available, which must otherwise be wasted, the supply to the communities and enterprises whose very life may be at stake must be limited to the slender amount of surplus unavoidably involved in the operation of the navigation works, because the Constitution does not permit any more energy to be generated and distributed?"

carries implications that were not involved in the argument for petitioners and would further commit this Court to the assertion of power in the Federal Government based upon the supposed need of communities as interpreted by Congress rather than the Constitution. Petitioners did not challenge the right of the Federal Government to make available by sale or lease or by like equivalent arrangement at the dam to the supposed communities or to the State or its subdivisions, or to cooperatives, or to private agencies, any right, easement, property or combination which the Federal Government owns and can sell. What we assert is that the Federal Government can not itself operate a permanent commercial business of local distribution consistently with the limitations of the Constitution.

Petitioners respectfully insist that the quoted expressions and the opinion in its general implications extend beyond the limits of the Constitution the doctrine of commercial processing—that is, manufacture—of elements or raw materials or rights into finished or final products where it is obvious that they are to be committed to the competitive commercial supply of some region selected permanently and immovably for the operation of the business by the Federal Government.

It is respectfully insisted that no decision of this Court has held that the Government has the right to take raw materials from the public domain, manufacture them into finished products in order, not indeed to offer the commodity on the general market or at points of concentration, but for the express purpose, evidenced by contracts and commitments found on this record to be per-

manent in character, of concentrating their sale in given areas in order to regulate the price of the commodity to the public; having moreover the direct, necessary and intended effect of monopolizing the business precisely as if the function asserted were as exclusive as the power to coin money.*

In all such cases it is not the intent of Congress, which can not be subjectively ascertained, or the intent of an administrative agency which upon occasion, as here, can be; it is the impact and effect, the necessary crushing and concentrated force upon a function reserved to the State and its citizens.

We respectfully submit that the dominant, the exclusive purpose for the execution of the contract of January 4th, 1934, was to acquire the transmission lines as a unit in a permanent commercial manufacturing system designed for a stated objective, and for no other purpose.

That is in fact not merely what the TVA is saying but what it is doing with all properties acquired by it. The actual effect is to destroy the business of the Alabama Power Company and to seize the operation and control of a local business heretofore regulated and controlled by the State.

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*As a prison prophylactic the Federal Government has the right to manufacture in a normal way articles and commodities both for the use of the Federal Government and, having lawfully manufactured them, to dispose of them in a manner not inconsistent with the Fifth and Tenth Amendments, but we respectfully submit that the Federal Prison Industries, Inc. (Executive Order No. 6917, December 11, 1934, Act Public No. 461, 73rd Congress, June 23, 1934) could not lawfully, even if Congress should undertake to delegate it the power, commit the Government to a permanent manufacturing business for the purpose of monopolizing the distribution of any given commodity in a selected area within State domain, or for the stated purpose of establishing a public yardstick to regulate the price of the commodity.

The record is made up and is complete. The cost and delay of reproducing it in a supplemental or plenary suit would be burdensome. The delay, confusion and controversy as to waiver and estoppel would be grave.

This Court subjected the Government on final decree against the Government in *United States v. Appalachian Coals, Inc.*, 288 U. S. 344, to no such vast duplication of time and expense in the possible contingency that the Government might determine to re-open the question later. It was ordered that the trial court retain jurisdiction to set aside the decree and take further proceedings if future developments justified that course. Here violation of the Constitution in competitive destruction of this property and business is imminent. It is so found by the lower courts. It is indisputable. Protective judicial action is indispensable.

We respectfully submit that the non-federal and illegal uses of the property and performance of the contract imminent on this record should be considered and adjudicated on this record and that this cause should not in any event be dismissed under circumstances which so gravely burden and impair the right of the petitioners to free their investment from overt acts under a program that is palpably violative of the functions of the federal government. If, in view of any change in theory as result of this Court's final conclusion a resurvey of the evidence should be deemed essential, it should plainly, in the interest of justice, be accomplished by vacating the final decree and remanding the cause for reconsideration

of the questions which have been excluded from consideration on this record.

Respectfully submitted,

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JOS. F. JOHNSTON,

Of Counsel for Petitioners.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FORNEY JOHNSTON,

Of Counsel.